

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8

ROGER KREPS DRYWALL
AND PLASTERING, INC.

Employer

and

PLASTERERS LOCAL NO. 80 a/w
OPERATIVE PLASTERERS & CEMENT
MASONS INTERNATIONAL ASSOCIATION

Petitioner

Case No. 8-RC-16339

and

BRICKLAYERS AND ALLIED
CRAFTWORKERS, LOCAL 16

Intervenor

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.¹

The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining the meaning of Section 9(b) of the Act:

All full-time and regular part-time journeymen and apprentice plasterers employed by the Employer in Ashtabula, Cuyahoga, Geauga, Lake, and Lorain Counties in Ohio, excluding all office clerical employees,

¹ The Petitioner and Intervenor filed post-hearing briefs that have been duly considered. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. The labor organizations involved claim to represent certain employees of the Employer. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

professional employees, guards and supervisors as defined in the Act, and all other employees.

The record does not indicate how many employees there are in the unit found appropriate herein.

The Petitioner, Plasterers Local 80, seeks a unit of plasterers employed by the Employer in Ashtabula, Cuyahoga, Geauga, Lake and Lorain Counties in Ohio. The Intervenor BAC asserts that the petition is barred by Section 9(a) contracts applicable to a substantial number of unit employees. In the alternative, the Intervenor argues that the unit should be restricted to Cuyahoga County only. The Employer takes no position on the composition of the unit.

I find the petitioned for unit is appropriate and hereby direct an election therein. The Intervenor will be permitted to appear on the ballot based on the Section 9(a) contract it has with the Employer.

The Employer, based in Youngstown, Ohio, is engaged in performing drywall, metal stud, acoustic and plastering work. In addition to other areas of Ohio and Pennsylvania, it has performed jobs in Cuyahoga, Lorain, Lake, Ashtabula, and Geauga Counties. However, the Employer acknowledges that it has performed no work in the latter three counties in over two years.

The record evidence establishes that the Employer uses a core group of plasterers that travel to each of its jobs wherever located. These individuals are from the Youngstown area and are members of Locals 179, the Plasterers local located in that city.² When working in Cuyahoga and the other four counties in question, the Employer testified that it might occasionally supplement this core group with other plasterers referred by the Petitioner. The record does not reveal when the Employer last employed a plasterer who was a member of, or who was referred to it by, the Intervenor. It is clear that this has not occurred for at least two years.

² There is some inconsistency in the record as to whether the core group of plasterers are all members of the Youngstown local or whether some are also members of Local 109 in Akron. As I find herein that the Local 109

Plasterers Local 31 was recently certified as the representative of the Employer's employees working in certain areas of Pennsylvania. The Employer also has current contracts with various Plasterers locals, including the Petitioner, Local 179 and Local 109. These agreements are all multi-employer agreements that the Employer is party to by means of letter of assent it executed. The contract with the Petitioner is a Section 8(f) agreement, effective from May 1, 1999 to April 30, 2002. By its terms, it covers only Cuyahoga County, but the record indicates that the Employer applies this agreement to work in contiguous counties as well.³ The Local 109 contract is also a Section 8(f) agreement, effective from June 1, 2001 to June 1, 2006, covering Carroll, Holmes, Medina, Portage, Stark, Summit, Tuscarawas and Wayne Counties.⁴ The Employer's contract with Local 179 in Youngstown, effective from June 1, 2001 to May 31, 2005, is acknowledged by the parties to be a Section 9(a) agreement. The contract with the Intervenor is also a Section 9(a) agreement, purporting to cover both bricklaying and cement mason work performed in Ashtabula, Lake and Geauga Counties.⁵

Unit Scope

I find the petitioned for unit appropriate for several reasons. First, I note that the Petitioner need only seek an appropriate unit, not the most appropriate one. **Overnite Transportation Co., 322 NLRB 723 (1996)**. The evidence clearly establishes that the Employer at all its jobs within these five counties has utilized the same core group of plasterers. Even though the Employer does not routinely perform work in all the counties in question, the record indicates that these same employees will be used when such work arises in the future.

agreement is a Section 8(f) agreement and therefore does not bar the petition, this lack of record clarity does not impact my decision.

³ To the extent that there is any potential ambiguity on this point, I take notice of the record in **Competitive Interiors, 8-RC-16340** involving these same unions, where there is clear testimony that the practice in this area is for employers to apply the Local 80 agreements in counties outside Cuyahoga, including the four other counties at issue in this matter.

⁴ In my decision in **Gash Concrete Construction Co., 8-RC-16332**, I found this same contract to be a Section 8(f) agreement.

The Intervenor argues that I should place no geographic limits on the unit, as I have declined to do in recent cases involving other locals of these two unions. However, in this case, unlike those the Intervenor refers to, it is the Petitioner that seeks geographic limits. These self-imposed limits are clearly intended to avoid a potential conflict with established Section 9(a) relationships between the Employer and Plasterers' locals elsewhere in Ohio and Pennsylvania. The Board has been amenable to limiting units on a geographic basis when the petitioner requests it. **Dezcon, Inc., 295 NLRB 109 (1989)**. Where another party seeks to exclude a county or other geographic area sought by a petitioner, it must show that the employer involved has never done business in that area and there is no basis for concluding that it will do business there in the future. **Oklahoma Installation Co., 305 NLRB 812 (1991)**. In this case, it is clear that the Employer has performed work in all five counties in the past and it intends to seek work in all five in the future.

Second, the Intervenor argues that if I find some geographic restrictions to be appropriate, I must limit the unit to Cuyahoga County only, based on the Section 8(f) agreement between the Petitioner and the Employer. I note that the Board has repeatedly declined to rigidly define a unit in a representation proceeding based on the scope of Section 8(f) agreements. **Alley Drywall, Inc., 333 NLRB No. 132 (2001)**, **Dezcon, supra.**⁶ Further, the relevant evidence indicates that the Employer has applied the terms of its 8(f) agreement(s) with the Petitioner to work in the other counties at issue. Accordingly, I find the five-county limit sought by the Petitioner to be appropriate.

⁵ I am satisfied that both the Local 179 and Intervenor agreements meet the criteria for Section 9(a) contracts set out in **Staughton Fuel & Material, Inc., 335 NLRB No. 59 (2001)**.

⁶ The cases cited by the Intervenor in support of this argument, **Met Elec. Testing Co., Inc., 331 NLRB No. 106 (2000)** and **Central Transport, Inc., 328 NLRB 407 (1999)** are distinguishable as both involved well established Section 9(a) relationships.

Contract Bar

The Intervenor also makes a number of contract bar arguments, none of which I find meritorious. First, the expiration date of the Intervenor's Section 9(a) contract with the Employer is April 30, 2002. The petition was filed on February 20, 2002, well within the 60 to 90 day window period permitting such filings. **Leonard Wholesale Meats, 136 NLRB 1000 (1962)**. Second, there is no evidence that the Local 179 agreement has ever been applied to any unit work performed by the Employer within these five counties. The same is true of whatever agreement the Employer may have with the recently certified Local 31.⁷ Accordingly, I do not find these contracts serve as a bar to this proceeding. Cf. **Houck Transport Co., 130 NLRB 270 (1961)**. The Employer's agreements with the Petitioner and Local 109, being Section 8(f) contracts, also do not constitute a bar. **John Deklewa & Sons, 282 NLRB 1375, 1387 (1987)**.

The Motion to Intervene Was Properly Granted

The sole remaining issue is whether the BAC, Local 16 should continue to be accorded intervenor status in this matter. Based upon BAC, Local 16's assertion that it was party to a Section 9(a) agreement covering some of the employees in the petitioned for unit, its Motion to Intervene was granted at hearing. Petitioner objects to this ruling, asserting that BAC, Local 16 represents none of the Employer's employees and should therefore not be accorded intervenor status.

The Board's Casehandling Manual, Part Two, Representation Proceedings, Section 11022 sets forth four appropriate methods by which a party can establish the necessary showing of interest to participate in a representation proceeding.⁸ In the instant case, BAC, Local 16 is party

⁷ Locals 31, 109 and 179 did not appear at hearing. On March 29, 2002 these locals were advised by facsimile of an opportunity to intervene in this proceeding by the close of business on April 3, 2002. None of these unions availed themselves of that opportunity.

⁸ A union will be regarded as satisfying the showing requirement as a petitioner in a RC case or as an intervenor in a RC, RM, or RD case if:

(a) it has submitted authorization cards or a list of signatures designating the union as the signers' agent for collective-bargaining purposes

to a 9(a) contract purporting to cover employees of the Employer performing plasterers work. Based on the foregoing, I hereby affirm the hearing officer' granting of the Motion to Intervene.

Since the Employer is engaged in the construction industry and the record reflects that the number of unit employees varies from time to time, the eligibility of voters will be determined by the formula set forth in **Daniel Construction Co., 133 NLRB 264 (1961)** and **Steiny & Co., 308 NLRB 1323 (1992)**.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

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- (a) it has submitted evidence from its records as to the individuals who are members of the union
 - (a) it is the certified or currently recognized bargaining agent of the employees involved (in this circumstance, a union continues as a party, unless it disclaims interest in representing the employees involved (Sec. 11120))
 - (a) it is the party to a currently effective or recently expired exclusive collective-bargaining agreement covering the employees involved in whole or in part.

Also eligible to vote are those employees who have been employed for a total of 30 working days or more within the period of 12 months immediately preceding the eligibility date for the election, or who have some employment in that period and have been employed 45 working days or more within the 24 months immediately preceding the eligibility date for the election, and who have not been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed.

Those eligible shall vote whether or not they desire to be represented by (1) Plasterers Local No. 80, a/w Operative Plasterers and Cement Masons International Association, Local Union; (2) Bricklayers and Allied Craftworkers, Local No. 16 or (3) Neither.

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses which may be used to communicate with them. **Excelsior Underwear, Inc.**, 156 NLRB 1236 (1966); **NLRB v. Wyman-Gordon Company**, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the *full* names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within seven (7) days from the date of this decision. **North Macon Health Care Facility**, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by, April 18, 2002.

DATED at Cleveland, Ohio this 4th day of April, 2002.

/s/ Frederick J. Calatrello

Frederick J. Calatrello
Regional Director
National Labor Relations Board
Region 8

347-40409